REMARKS

At the time of the *Office Action*, Claims 1-21 were pending and stand rejected. Applicant respectfully traverses these rejections.

Procedural History

This Final Office Action is the *sixth action* on the merits for this application. Applicants respectfully remind the PTO that this Application has been pending for more than five years. Applicants also remind the PTO that the single reference, U.S. Patent No. 5,684,945 to Chen et al. (*Chen*), had been applied in the five preceding Office Actions of April 20, 2007, September 20, 2007, April 7, 2008, November 4, 2008, and May 13, 2009. In accordance with M.P.E.P. § 707.02, Applicants request that this Application be considered "special." Applicants request that the Examiner's supervisor personally check on the pendency of this application with a view to finally concluding its prosecution in accordance with M.P.E.P. § 707.02.

I.   Claim Rejections under 35 U.S.C. § 102

The Examiner rejects Claims 1, 4-19, and 21 under 35 U.S.C. § 102(b) as being anticipated by *Chen*. Applicant respectfully traverses these rejections.

A.   Legal Standard

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987) (emphasis added); M.P.E.P. ch. 2131. "The *identical invention* must be shown in as *complete detail as contained* in the . . . claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989) (emphasis added); *see also* M.P.E.P. ch. 2131. In addition, "[t]he elements must be arranged as required by the claim." *Richardson v. Suzuki Motor Co.*, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989); *In re Bond*, 15 U.S.P.Q.2d 1566 (Fed. Cir. 1990); M.P.E.P. ch. 2131.

The Federal Circuit recently clarified this standard in *Net Moneyin, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 88 U.S.P.Q.2d 1751 (Fed. Cir. 2008). In *Net Moneyin*, the Federal Circuit held that a finding of anticipation under 35 U.S.C. § 102 is proper only when a "reference discloses within the four corners of the document not only all of the limitations

claimed but also *all of the limitations arranged or combined in the same way* as recited in the claim." *Net Moneyin*, 545 F.3d at 1371, 88 U.S.P.Q.2d at 1759 (emphasis added). The prior art reference must *"clearly and unequivocally* disclose the claimed invention … *without any need for picking, choosing, and combining various disclosures not directly related to each other by* the teachings of the cited reference." *Net Moneyin*, 545 F.3d at 1371, 88 U.S.P.Q.2d at 1760 (emphasis added, internal typographical notations omitted).

The *Chen* reference is an unwieldy document. It features 33 figures, 98 columns of text, and almost 50,000 words. Thus, there is ample opportunity "for picking, choosing, and combining various disclosures not directly related to each other," a practice expressly forbidden by the Federal Circuit. *Net Moneyin*, 545 F.3d at 1371, 88 U.S.P.Q.2d at 1760. Unfortunately, the prosecution history is littered with improper picking and choosing of unrelated passages from the *Chen* reference. Examples follow.

B.   *Chen* does not disclose all of the limitations of Claim 1

Applicant respectfully submits that *Chen* fails to disclose, teach, or suggest, all of the elements recited in Claims 1, 4-19, and 21.

1.   *Chen* does not disclose "determining a system usage pattern of a first application, the system usage pattern indicating a change in the system usage of the first application from a first time period to a second time period"

Applicants submit that *Chen* fails to disclose, teach, or suggest "determining a system usage pattern of a first application, the system usage pattern indicating a change in the system usage of the first application from a first time period to a second time period," as recited in Independent Claim 1. In the most recent *Office Action*, the Patent Office cobbles together the following rejection using three disparate passages from *Chen*:

> determining a system resource usage pattern of a first application (col. 87, lines
>
> 3-12), the system resource usage pattern indicating a change (col. 92, lines 25-34) in
>
> the system usage of the first application from a first time period to a second time period
>
> (col. 15, lines 35-40);

Office Action at 4.

First, as evidence of "determining a system resource usage pattern of a first application," the Patent Office cites *Chen* at column 87, lines 3-12, which states:

> As observations become more precise, automatic data filters can be used to automatically correlate and cross correlate data patterns to help automate the data analysis process. The data filter takes specific system performance data at each sample point and runs it through a correlation procedure to see if the data values can be correlated to some known pathological pattern. The filtering process may need to sample the data over time to match a data trend in addition to individual sampled values.

This passage is included under the heading "PATHOLOGY LIBRARY AND SEARCH FUNCTIONS," *Chen*, col. 84, ll. 40-41, and concerns accessing and searching a pathology library. *Chen*, col. 86, ll. 23-24.

Next, as evidence of "the system resource pattern indicating a change," the Patent Office cites *Chen* at column 92, lines 25-34, which states:

> When this is the case, the condition is monitored constantly. Each time the condition switches from false to true, a time stamp is taken. As long as the condition stays true, the elapsed time since the last time stamp is compared to DURATION and, if it equals or exceeds DURATION, the alarm is triggered.
>
> When it can be done without forcing the data feed interval to become less than one second, filtd makes sure at least three data feeds will be taken in DURATION seconds. This is done by modifying the data feed interval if necessary.

This passage is included under the heading "DATA REDUCTION AND ALARMS," *Chen*, col. 87, l. 33, and concerns "how long time a condition must remain true before the alarm is triggered and . . . the minimum number of minutes between each triggering of the same alarm." *Chen*, col. 92, ll. 8-13.

Finally, as evidence of "the system usage of the first application from a first time period to a second time period," the Patent Office cites *Chen* at column 15, line 35-40, which states:

> The time interval parameter specifies the data recording sampling frequency, in milliseconds. This time interval allows the granularity of samples to be varied in real time, and further allows for differing instruments to record the same value at different granularities, or frequencies.

This passage is included under the heading "IMPLEMENTATION OF RECORDING SUBSYSTEM," *Chen*, col. 13, ll. 7-8, and concerns information that is written to a recording file when a new recording file is being created. *Chen*, col. 15, ll. 12-17.

Thus, the Patent Office's rejection requires citation to three unrelated passages of *Chen*. The passage cited at column 15 is directed towards how often a recording system should collect data samples in order to generate a recording. *Chen*, col. 15, ll. 35-40. The

passage cited at column 87 is directed towards how to search the generated recording for a specific data value. *Chen*, col. 87, ll. 3-12; *see also* col. 86, ll. 23-24 (introducing "an efficient access mechanism to be useful for library users"). The passage cited at column 92 is directed towards how to condition alarms based on data values within the recording. *Chen*, col. 92, ll. 23-34.

The Patent Office's citation of all three passages would suggest that these passages somehow relate to each other, but this is not the case. How the recording system collects data samples (column 15) is completely unrelated to how the recording system is searched (column 87) or how alarms are set based on the collected data values (column 92). Applicants respectfully remind the Patent Office of the Federal Circuit's prohibition against "picking, choosing, and combining various disclosures not **directly related** to each other," a practice expressly forbidden by the Federal Circuit. *Net Moneyin*, 545 F.3d at 1371, 88 U.S.P.Q.2d at 1760 (emphasis added). Applicants respectfully submit that these passages are not "directly related," as required by the Federal Circuit, and that it is improper to combine these unrelated passages in a manner suggested by the Patent Office.

Accordingly, Applicant respectfully submits that the cited portion of *Chen* does not disclose, teach, or suggest "determining a system usage pattern of a first application, the system usage pattern indicating a change in the system usage of the first application from a first time period to a second time period," as recited in Independent Claim 1.

2. *Chen* does not disclose "determining whether the system usage pattern of the first application satisfies a predetermined criteria associated with one or more problems"

Applicants submit that *Chen* fails to disclose, teach, or suggest "determining whether the system usage pattern of the first application satisfies a predetermined criteria associated with one or more problems," as recited in Independent Claim 1.

As explained in the previous Response to Office Action dated February 4, 2009, the "alarm" feature of *Chen* identified by the Examiner merely "consists of an action part that describes what action to trigger and a condition part that defines the conditions for triggering the alarm." *See Chen*, col. 91 lines 30-33. For example, "if it is desired to be informed whenever the paging space on a host has less than 10 percent free or there is less than 100 pages free paging space, an alarm definition like the following could be used . . . ." *Id.* at col. 92 lines 56-60. Respectfully, the alleged alarms of *Chen* merely inform a user when a user-

defined condition occurs. The alarms of *Chen* do not "determin[e]" whether a system usage pattern of a first application satisfies a predetermined criteria associated with one or more problems" as required by Claim 1.

Unfortunately, the most recent *Office Action* ignores these arguments. Instead, the Patent Office states: "As per claims 1-3, 12, 14, 15, and 17-20, applicant's arguments have been fully considered but they are moot in view of new claim analysis. Refer to the corresponding section of the claim analysis for details." **However, the Patent Office does not provide a "new claim analysis" in response to these arguments, but instead repeats the previous rejections:**

> from the monitored system usage, determining whether a system usage pattern
>
> of a first application satisfies a predetermined criteria associated with one or more
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> problems (col. 92, lines 56-60); and if the system usage pattern of the first application
>
> satisfies the predetermined criteria (col. 87, lines 53-56), identifying the first application
>
> to a user (col. 16, lines 19-23).

Office Action dated November 4, 2008, at 3.

> determining whether the system resource usage pattern of the first application
>
> satisfies a predetermined criteria associated with one or more problems (col. 92, lines
>
> 56-60); and if the system resource usage pattern of the first application satisfies the
>
> predetermined criteria (col. 87, lines 53-56), identifying the first application to a user
>
> (col. 16, lines 19-23).

Office Action dated May 13, 2009, at 3.

"Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument <u>and answer the substance of it.</u>" M.P.E.P. § 707.07(f) (emphasis added). In the most recent *Office Action*, the Patent Office repeated its prior claim analysis without answering the substance of Applicants' arguments. Thus, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009.

For at least these reasons, Applicant respectfully submits that independent Claim 1 and its dependent claims are allowable under 35 U.S.C. § 102 over *Chen*. For analogous

reasons, independent Claims 12, 14, 15, 17, 18, and 19 and their respective dependent claims are allowable under 35 U.S.C. § 102.

B.   *Chen* does not disclose all of the limitations of Claim 9

Applicant respectfully submits that *Chen* fails to disclose, teach, or suggest, "a number of processes that each of the one or more applications have spawned" as recited in Claim 9.

> In the previous Response to Office Action dated February 4, 2009, Applicants stated:
>
>> The Examiner has not pointed to any portion of *Chen* that teaches, suggests, or discloses that the processes were spawned by an **application**. Moreover, Applicant respectfully notes that the Examiner identifies a **process** ID of *Chen* as the "identifier of a first **application**" recited in Claim 10. *See Office Action*, page 5. Applicant respectfully submits that it is improper for the Examiner to rely on the processes disclosed in *Chen* as both a **process** and an **application** to reject the pending claims.

In other words, claim 9 recites that "the one or more applications have spawned" "a number of processes," but the Patent Office is citing the "processes" disclosed in *Chen* as performing both the application and process roles of Claim 9. According to the Patent Office's proposed application of *Chen*, the processes of *Chen* would spawn themselves, but this clearly is not the case.

However, in the most recent *Office Action*, the Patent Office does not respond to this argument; instead, the Patent Office picks and chooses more unrelated passages from *Chen*.

> First, the Patent Office quotes *Chen* at column 22, lines 42-48, which states:
>
>> In fact, a console of instruments can he constructed to show data from local and remote hosts, including statistics on individual processes. Additionally, custom data from applications that have registered with the Data Server daemon can be added to the viewing instruments that show normal system statistics (also from local or remote hosts).

See Office Action at 15. Although this passage happens to use the words "processes" and "applications," this citation is not responsive to Applicants' concerns. As explained above, "the Examiner identifies a process ID of *Chen* as the 'identifier of a first application' recited in Claim 10." Thus, the fact that *Chen* uses the term "application" in other, unrelated passages does not explain why the Patent Office is applying the processes of *Chen* against both the "applications" and "processes" recited in Applicants' claims. Similarly, the Patent Office's citations to *Chen* at column 3, lines 50-58; column 16, lines 18-28; and column 93,

lines 13-28 also fail to explain why the Patent Office is relying on the processes disclosed in *Chen* as both a process and an application to reject the pending claims.

Accordingly, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009. Applicant respectfully submits that it is improper for the Examiner to rely on the processes disclosed in *Chen* as both a **process** and an **application** to reject the pending claims. Thus, for at least these reasons, Applicant respectfully submits that Claim 9 is allowable under 35 U.S.C. § 102 over *Chen*.

II.   Claim Rejections under 35 U.S.C. § 103

In the *Office Action*, the Examiner rejects Claims 2, 3, and 20 under 35 U.S.C. § 103(a) over *Chen* in view of U.S. Patent No. 5,485,626 to Lawlor et al. (*"Lawlor"*). Applicant respectfully traverses these rejections.

A.   The proposed *Chen-Lawlor* combination does not disclose all of the limitations of Claim 2.

Claim 2 is directed to the method of Claim 1, "wherein the system resource usage comprises a number of the one or more processes that each of the one or more applications have spawned and the predetermined criteria comprises exceeding a predetermined limit on the number of processes that each of the one or more user applications may spawn." The Examiner concedes that *Chen* fails to disclose a "predetermined limit on the number of processes that each of the one or more user applications may spawn." Accordingly, to reject these limitations, the Examiner cites to a "work synchronization" feature of *Lawlor* at Col. 47, lines 28-42. *See Office Action*, page 13.

As explained in the previous Response to Office Action dated February 4, 2009, *Lawlor* defines "synchronization" as "the guarantee that an order or point of execution can be specified among two or more tasks." *Lawlor*, Col. 1, lines 46-51. To facilitate work synchronization *Lawlor* discloses a "SETCLV instruction [that] sets limits to the number of processes spawned." *Lawlor*, Col. 47, lines 28-29. When the spawn count is "equal to the count limit set by the Set Count Limit Value (SETCLV) . . . the parent process executes the next sequential instruction (NSI)." *Lawlor*, Col. 47, lines 38-41. Thus, *Lawlor* discloses performing an action when the count is *equal* to the SETCLV. Claim 2, however, requires performing an action (identifying the first application to a user) if the system usage pattern *exceeds* the predetermined limit on the number of processes that each of the one or more

applications may spawn. Moreover, Applicant respectfully submits that the limit on the number of processes spawned disclosed in *Lawlor* is not associated with one or more problems as required by Claim 2.

Unfortunately, the most recent *Office Action* ignores these arguments regarding *Lawlor*. Instead, the Patent Office states: "As per claims 1-3, 12, 14, 15, and 17-20, applicant's arguments have been fully considered but they are moot in view of new claim analysis. Refer to the corresponding section of the claim analysis for details." **However, the Patent Office does not provide a "new claim analysis" in response to these arguments, but instead repeats the previous rejections:**

> As per claim 2, Chen discloses of monitoring processes (col. 93, lines 13-29).
>
> However Chen fails to explicitly disclose a predetermined limit on the number of processes that each of the one or more user applications may spawn.
>
> Lawlor teaches:
>
> the system resource usage comprises a number of the one or more processes that each of the one or more user applications have spawned and the predetermined criteria comprises a predetermined limit on the number of processes that each of the one or more user applications may spawn (col. 47, lines 28-42).

Office Action dated November 4, 2008, at 12.

> However Chen fails to explicitly disclose a predetermined limit on the number of processes that each of the one or more user applications may spawn.
>
> Lawlor teaches:
>
> the system resource usage comprises a number of the one or more processes that each of the one or more user applications have spawned and the predetermined criteria comprises a predetermined limit on the number of processes that each of the one or more user applications may spawn (col. 47, lines 28-42).

Office Action dated May 13, 2009, at 13.

"Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument <u>and answer the substance of it</u>." M.P.E.P. § 707.07(f) (emphasis added). In the most recent *Office Action*, the Patent

Office repeated its prior claim analysis without answering the substance of Applicants' arguments. Thus, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009.

Accordingly, Applicant respectfully submits that Claim 2 is allowable over the *Chen-Lawlor* combination under 35 U.S.C. § 103(a).

B.   The proposed *Chen-Lawlor* combination does not disclose all of the limitations of Claim 3.

Claim 3 is directed to the method of Claim 1, wherein "determining whether a system usage pattern of the first application satisfies a predetermined criteria associated with one or more problems comprises determining whether the first application has orphaned one of the one or more running processes."

As explained in the previous Response to Office Action dated February 4, 2009, the Examiner points to the "work synchronization" feature of *Lawlor* to teach this limitation. The portion of *Lawlor* cited by the Examiner provides:

> Then the SETCLV instruction sets limits to the number of processes spawned. The EQTDE instruction spawns the processes; e.g., this is the "fork". In the example illustrated, in addition to the main line of application code (i.e., the "parent"), there are three processes (i.e., children) spawned. The main line of code continues until it issues the Receive Count (RECC) instruction. The spawned processes execute until complete at which time they each, in turn, encounter the Send Count (SENDC) instruction. The spawned processes or threads terminate with the Dequeue Thread Dispatch Element (DQTDE) instruction. The count sent by the second of the spawned processes is equal to the count limit set by the Set Count Limit Value (SETCLV) instruction, at which point the parent process executes the next sequential instruction (NSI).
>
> For the JOIN, the FORTRAN compiler generates an SRC (Thread Send/Receive Counter) and the inline code RECC SRC.sub.-- address. For the FORK (activate parallel thread) function, the compiler generates code to increment the SRC counter limit value. This keeps track of the number of parallel tasks.

Lawlor, Col. 47, lines 28-42. Applicant respectfully contended that *nothing* in this portion of *Lawlor* discloses, an "orphaned process", let alone "determining whether the first application has orphaned one of the one or more running processes" as required by Claim 3.

In the previous Response to Office Action dated February 4, 2009, Applicants also requested:

Moreover, to the extent that the Examiner intends to maintain this rejection, Applicant respectfully requests the Examiner to more specifically identify which portions of this section support the rejection so that Applicant may respond accordingly.

Unfortunately, the most recent *Office Action* ignores these arguments and requests regarding *Lawlor*. Instead, the Patent Office states: "As per claims 1-3, 12, 14, 15, and 17-20, applicant's arguments have been fully considered but they are moot in view of new claim analysis. Refer to the corresponding section of the claim analysis for details." **However, the Patent Office does not provide a "new claim analysis" in response to these arguments and requests, but instead repeats the previous rejections:**

> Lawlor teaches:
>
> comprises determining whether the first application has orphaned a process (col.
>
> 47, lines 28-42).

Office Action dated November 4, 2008, at 13.

> Lawlor teaches: determining whether the first application has orphaned a process
>
> (col. 47, lines 28-42).

Office Action dated May 13, 2009, at 15.

"Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument <u>and answer the substance of it</u>." M.P.E.P. § 707.07(f) (emphasis added). In the most recent *Office Action*, the Patent Office repeated its prior claim analysis without answering the substance of Applicants' arguments. Thus, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009.

For at least these reasons, Applicant respectfully contends that Claim 3 is in condition for allowance.

<u>Finality of the Rejection</u>

Applicant respectfully submits that the finality of the *Office Action* dated May 13, 2009, is premature. "Before final rejection is in order a clear issue should be developed between the examiner and applicant." M.P.E.P. § 706.07. "The examiner should never lose sight of the fact that in every case the applicant is entitled to a full and fair hearing,

and that a clear issue between applicant and examiner should be developed, if possible, before appeal." M.P.E.P. § 706.07.

In this Response to Office Action, Applicants have identified at least three arguments that were ignored by the Patent Office in its most recent *Office Action.* **"Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument <u>and answer the substance of it</u>."** M.P.E.P. § 707.07(f) (emphasis added). As explained above, the Patent Office has repeatedly failed to answer the substance of Applicants' arguments. Because the Patent Office has ignored Applicants' arguments, a clear issue has not developed between the Applicants and Examiner.

Accordingly, Applicant respectfully submits that the finality of the *Office Action* dated May 13, 2009, is premature and should be withdrawn.

<u>No Waiver</u>

All of Applicant's arguments are made without prejudice or disclaimer. Additionally, Applicant has merely discussed example distinctions from the references cited by the Examiner. Other distinctions may exist, and Applicant reserves the right to discuss these additional distinctions in a later response or on appeal, if appropriate. The example distinctions discussed by Applicant are sufficient to overcome the Examiner's rejections. In addition, Applicant does not acquiesce to the Examiner's statements, regardless of whether Applicant has responded to the statements.

CONCLUSION

Applicant has now made an earnest attempt to place this case in condition for immediate allowance. For the foregoing reasons and for other apparent reasons, Applicant respectfully requests full allowance of all pending claims.

If the Examiner feels that a telephone conference or an interview would advance prosecution of this Application in any manner, please feel free to contact the undersigned attorney for Applicant.

Applicant believes no fees to be currently due. However, if a fee is determined to be due, the Commissioner is authorized to charge such fee, or credit any overpayment, to **Deposit Account No. 02-0384 of BAKER BOTTS L.L.P.**

Respectfully submitted,

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